19 February 1975

MEMORANDUM FOR THE RECORD

SUBJECT: Meeting of DD/A Freedom of Information Officers - 18 February 1975

1. Between 0915 and 1015 hours on 18 February 1975, a meeting of Freedom of Information Officers representing all DD/A Offices took place in the DD/A Conference Room. The meeting was chaired by the Assistant for Coordination, 25X1A but Mr. [redacted] Office of General Counsel, did most of the talking.

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2. Mr. [redacted] at the beginning of the meeting distrib- 25X1A uted advance copies of [redacted] the "handbook" for the implementation of Freedom of Information Act in the Agency.

3. The main purpose of the meeting was to present a briefing on the OGC project, being handled by Mr. [redacted], 25X1A to develop a "listing" of Agency activities which can properly be identified as relating to intelligence sources 25X1A and methods. Mr. [redacted] pointed out that the DCI has always had the responsibility for the protection of intelligence sources and methods, but that to date no definition of what constitutes sources and methods has been formalized. It has now been determined advantageous, in the light of 25X1A the [redacted] case and the revision of the Freedom of Information Act, to have the DCI designate as "sources and methods" those intelligence activities needing protection with or without security classification. Inherent in the concept is the need to amend this "listing" from time to time. The idea is that in the event of litigation of the [redacted] variety 25X1A or under FOIA, the predisposition of the DCI compared to a specific piece of information would represent substantial support of an Agency position.

4. All Agency components are being solicited for a draft listing of their "items" for such a listing. Although in a paper distributed earlier on the subject a deadline of 21 February is mentioned, it was recognized as unrealistic. Mr. [redacted] emphasized, however, that the DD/A wishes its portion of the first draft to be completed as soon as possible.

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5. Since Mr. [redacted] expressed his willingness to discuss the project at an Office level, especially if Office components were being tasked to compile an overall listing, I requested him to address the Office of Security staff meeting on Thursday, 20 February, for this purpose.

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Chief, Policy and Plans Group

Protection of Agency Intelligence Sources and Methods

1. Both the National Security Act of 1947 and the CIA Act of 1949 provide that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Neither Act specifies the method or methods by which this is to be accomplished.

2. There are a number of methods that can be used to protect intelligence sources and methods from unauthorized disclosure. Some are currently in practice while others are being reviewed to determine if they could supplement the current methods. One method of protection is to deny access. We currently practice such a method by locking up documents containing sources and methods information. We also deny access by our compartmentization techniques and need-to-know rules.

3. Another method of protection is through the classification authority. The authority for today's classification system is derived from a series of Executive orders issued by the President pursuant to his own constitutional and statutory authorities. The current classification authority specifies, in a general sense, what types of information qualifies for protection and provides declassification procedures, which, even for information originally classified by the Agency, does not give the DCI the final authority as to what will be declassified.

4. Other methods of protection are criminal sanctions and contractual restrictions. Both of these methods have been employed in connection with the classification system. The Espionage Laws make it a criminal act to reveal certain classified information. Unfortunately, these laws are not necessarily directly applicable to an act of unauthorized disclosure of an Agency intelligence source or method. Further, these laws require the Government to prove an intent to injure the United States was associated with the disclosure of the classified information. Proving intent to injure the United States is difficult. There have been some proposals to make the unauthorized revelation of Agency sources and methods by an Agency employee a crime. If such a proposal were adopted by Congress, the sources and methods determinations described in the latter paragraphs of this paper will probably be required. Even if such criminal sanctions are not adopted however, the determinations as outlined below will be useful in protecting sources and methods.

5. Many parts of the Government, including the Agency, require prospective employees to sign a secrecy agreement prior to or coincident with their initial employment. Under such agreements, Agency employees agree not to reveal or publish classified material without authorization from the Agency. Such agreements have been upheld by the courts as valid and enforceable.

6. The Agency's most recent experience in enforcing such an agreement is the "Marchetti Case." There, the Agency, having learned that ex-employee Marchetti intended to publish a book about the Agency, obtained an injunction prohibiting his doing that until after the Agency had removed the classified materials from the proposed manuscript. Pursuant to the injunction, Marchetti submitted the completed manuscript prior to publication and the Agency found a number of items that we maintained were classified. Disagreeing with that finding, Marchetti filed suit challenging the validity of the classification. The Government then had the burden of proving that the previous finding was proper. Some items were relatively direct. A manual could be produced which evidenced a previously made determination that certain information should be classified at a specific level. For example, such a manual might have contained the determination that the resolution of a particular photographic reconnaissance system is to be classified SECRET. The District Court, in examining each of the contested items, could easily see the evidence of the prior determination, compare it to what Marchetti wanted to publish and find justification for requiring it to be withheld from publication. In those cases in which such documented evidence could be introduced, the court upheld the Agency position. In a number of cases, however, such documented prior determinations did not exist. In general, the court ruled against the Agency on these items. While this ruling has been just overruled by the Court of Appeals, an improtant point is evident. That point is that the most direct and comprehensible method of protection of intelligence sources and methods will probably get the widest support by the courts.

7. While for the moment, pending re-hearing in the District Court and/or grant of certiorari by the Supreme Court, the Agency seems to be "on top" of the Marchetti-type situation. However, we face a multitude of Freedom of Information Act (FOIA) cases. Under that Act there are nine exemptions which can be the basis for denying a request for Agency documents pursuant to the Act. The first is material classified pursuant to Executive order. The third is for material specifically exempted from disclosure by statute. While it has not been litigated, it is reasonable to assume that the sources and methods provisions of the 1947 and 1949 Acts fall within the scope of this third exemption.

8. When the Agency is involved in FOIA litigation, as it will most assuredly be, it will be convincing to be able to argue that a request should be denied because it is for materials containing information which is exempted from disclosure by the sources and methods provisions of our 1947 and 1949 Acts. However, to be able to pursue this route, the Agency should be able to be in the position of showing that a prior determination had been made by the Director that the particular aspect of either a source or method that is now the subject of the FOIA request is within the scope of his statutory responsibility. In otherwords, the DCI should, at the earliest possible date, undertake to adopt, pursuant to his statutory responsibility, a detailed listing of the various aspects of intelligence sources and the various aspects of intelligence methods that require protection from unauthorized disclosure. In order to be able to undertake such an adoption, a list of these aspects must be prepared.

10. The list should consist of an itemization of each individual aspect of intelligence sources and each individual aspect of intelligence methods that require protection. The individual aspects hopefully can be to some degree general yet without being so general that they would include aspects that do not require protection. As an example, the listing of "all names of agents of the Agency" as an aspect of intelligence sources that should be protected would probably be too broad as the name itself is not what requires protection. What requires protection is the association of the name with the Agency. Accordingly, the aspect should be described as "the association of the name of any Agency agent with the Agency." This kind of general description, property limited, precludes the necessity of having to list the specific name of each Agency agent as an aspect that requires protection. Similarly, an item such as "the names of all Agency employees" would be too broad as the Agency openly acknowledges the names of some of its employees. A more limited description might be "the name of any Agency employee, who has served, is serving or may serve under cover, the revelation of which might damage the future effectiveness of such cover arrangements."

11. The objective of the current undertaking is to definitively list each aspect of intelligence sources and methods in enough detail so as not to include non-protectable information, yet in enough generality that can protect the full scope of the particular aspect. Each Agency office should list all those aspects within their particular responsibility. Hopefully the first draft of such lists can be forthcoming by no later than 21 February.

They are dreaming!

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